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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1955**

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**No. 435**

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GIUSEPPE GAGLIANO, PETITIONER

*v.*

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed a judgment of the District Court for the Eastern District of Louisiana discharging a writ of habeas corpus.

### Opinions Below

The opinion of the Court of Appeals, set forth in Appendix B, herein is reported at 222 F. 2d 958. The District Court's judgment is set forth at pages 17 and 18 of the record (Appendix A, herein). No written opinion was rendered by that court.

## Jurisdiction

The judgment of the Court of Appeals was entered on June 21, 1955 (R. 33), and a petition for rehearing was denied on August 16, 1955 (R. 39). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Question Presented

Whether an alien who came here in 1921 and was convicted for the unlawful transfer of one ounce of heroin in 1927 and subsequently declared to be a non-deportable alien in 1939 by the Immigration and Naturalization Service is deportable under the Immigration and Nationality Act of 1952 [8 U.S.C. 1251(a)(11), 1251(d)] or whether his non-deportable status is preserved under the savings clause of that Act [8 U.S.C. 1101, Note].

## Statutes

Section 241(a)(11) of the Immigration and Nationality Act of 1952 [8 U.S.C. 1251(a)(11); 66 Stat. 206] provides in part:

> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who——
>
> * * * * *
>
> is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture,

production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihauna, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;"

Section 241(d) of the Immigration and Nationality Act of 1952 [8 U.S.C. 1251(d); 66 Stat. 208] provides:

"Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

Section 405(a) of the Immigration and Nationality Act [8 U.S.C. 1101, Note; 66 Stat. 280] provides as follows:

"Sec. 405(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing at the time this Act shall take effect; but as to all such prose-

cutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * "

## Statement

Petitioner, a native of Italy, came here on April 9, 1921, and has been here ever since. He is married to a citizen of the United States and is the father of two American born children, one of whom is a World War II veteran (R. 3, 4; Immigration Minutes, pp. 5, 17, 18).

Petitioner's deportation has been directed under the Immigration and Nationality Act of 1952 [8 U.S.C. 1251(a)(11)] solely upon the ground that he was convicted and sentenced for one year in 1927 for the transfer of one ounce of heroin without registration of the same or payment of tax thereon. (Board of Immigration Appeals decision of January 29, 1954). A previous deportation proceeding based upon this 1927 conviction was cancelled in 1929 (Appendix E, herein).

Petitioner brought habeas corpus proceedings in the District Court in New Orleans and that Court discharged the writ. Upon appeal to the Court of Appeals the judgment was affirmed. Petitioner contended that under the savings clause (8 U.S.C. 1101, Note) his status as a non-deportable alien was preserved. The Court of Appeals rejected this contention stating (Appendix B):

> "The decision in the Marcello case rendered May 31, 1955, admittedly forecloses all of the appellant's contentions except one. As we understand that contention, it is that Section 1251(a)(11), Title 8 U.S. Code, when considered in the light of the savings clause embodied in the 1952 Act, Section 405(a), 66

Stat. 280, 8 U.S. Code 1101, Note, and the decisions in *United States* v. *O'Rourke,* 8th Cir., 213 F. 2d 759, and *Ex parte Robles-Rubio,* D.C. Cal., 119 F.S. 610, should not be *construed* to affect the *status* of a non-deportable alien. Unfortunately for appellant, we think that issue also, whether formally presented and argued or not, was implicitly foreclosed by the Marcello decision, and, hence, is no longer open for decision by this Court.

**Reasons For Granting the Writ**

This case raises an important question regarding the meaning of the savings clause of the Immigration and Nationality Act of 1952 and the application of this provision to the deportation sections of the Act. A substantial number of cases pending before the courts and the Immigration and Naturalization Service await a final determination of this issue. The decision below presents a conflict between the Fifth, Eighth and Ninth Circuits, a conflict with this Court's broad interpretation of the savings clause in *United States* v. *Menasche,* 348, U.S. 528 (1955), and a misinterpretation of the scope of this Court's decision in *Marcello* v. *Bonds,* 349 U.S. 302 (1955).

1. Many aliens who have hitherto enjoyed a non-deportable status are now the subject of deportation proceedings because of conduct occurring many years before 1952. Petitioner's case is typical. He committed a crime in 1927 and was advised in 1939 that his immigration status here was unaffected by this conduct (Appendix E). It is now sought to deport him for his misconduct in 1927. Did Congress intend to uproot persons like petitioner or did it intend to preserve their non-deportable status through the savings clause? Did Congress in the Immigration and Nationality Act of 1952 follow the teachings of Christianity

that a man is to be forgiven his sins or did it cast such doctrine aside? This issue and the interrelation of the savings clause to the deportation section of the Immigration and Nationality Act has not been decided by this Court and merits a Supreme Court ruling.

2. In *United States* v. *Menasche*, 348 U.S. 528, 533, 535 (1955), this Court said:

> The 1952 Act made the enumeration of matters preserved by subsection (a) more complete and all-inclusive by adding: 'status,' 'condition,' 'right in process of acquisition,' 'liability,' and 'obligation.'
>
> • • • • •
>
> The whole development of this general savings clause, its predecessors accompanying each or the recent codifications in the field of immigration and naturalization, manifests a well established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress.

If Congress intended not to strip aliens of advantages gained under prior laws, then petitioner's status as a nondeportable alien was preserved. We submit that the decision below failed to consider the effect of the *Menasche* case and is in conflict therewith.

3. *U.S. ex rel DeLuca* v. *O'Rourke*, 213 F. 2d 759 (C.A. 8, 1954), involved an alien convicted in 1943 of violating our narcotic laws. At the time of sentence, the Court recommended that DeLuca be not deported pursuant to the law then in force, 8 U.S.C. 155(a). The Immigration

and Naturalization Service thereafter instituted deportation proceedings under the 1952 Act. The Eighth Circuit ruled:

> "We question whether it is specifically provided in the Act that an alien convicted upon a narcotic charge involving moral turpitude, who the sentencing judge recommended should not be deported, should, nevertheless, be deported because of his conviction. Unless there is such a specific provision, it would seem that the savings clause is broad enough to preserve the efficacy of the recommendation of the sentencing judge and to prevent the deportation of the alien because of the conviction.

Accord: *Ex parte Robles-Rubio*, 119 F. Supp. 610, 613 (N.D. Calif. 1954).

In *Yanish* v. *Barber*, 211 F. 2d 467, 470 (C.A. 9, 1954), the Court said:

> It would appear from the language of this reservation (the savings clause) that Congress, as a measure of policy or precaution, intended to preserve the effectiveness of all subsisting proceedings, orders, or judgments fixing or determining individual statuses, obligations, liabilities, or rights; and for this purpose to have continued in force the statutes or parts thereof under which such status, obligation, liability or right became fixed or determined.

If petitioner had been ordered deported by the Immigration and Naturalization Service in 1939, it would be clear that the deportation order and his status as a deportable alien was preserved under the savings clause of the 1952 Act. Is not the converse true? As the petitioner was cleared in 1939 by order of the Immigration and Naturali-

zation Service (Appendix E herein) this order and his non-deportable status were preserved. If there be a conflict between the savings clause and the retroactive provisions of 8 U.S.C. 1251(d), then the two can and should be harmonized by permitting the latter to operate only where there is no preexisting order granting deportation immunity. There is no specific section of the Act which requires the deportation of aliens previously declared non-deportable by the Courts or as here, by the Immigration and Naturalization Service. When Congress determined to carve an exception out of the savings clause, it did so as in 8 U.S.C. 1426(a), 1429, by specific reference to that clause. *Shomberg* v. *United States,* 348 U.S. 540 (1955).

In any event, we submit that the apparent conflict and the interrelation of the savings clause to the deportation section presents an issue of moment in the administration of our immigration laws and should be resolved by this Court.

4. Finally we submit that the Court below has misinterpreted the scope of the decision of this Court in *Marcello* v. *Bonds,* 349 U.S. 302 (1955). The Court of Appeals was of the opinion that whether or not the instant issue was "formally presented and argued or not" it was implicitly foreclosed by the Marcello decision (Appendix B). Traditionally this Court does not decide or foreclose issues not presented to it or in the Courts below. This issue was not raised in *Marcello* in the lower courts. That this issue was not before this Court was acknowledged by the Government in its Marcello brief (p. 41, footnote 8). Marcello belatedly sought certiorari on this issue for the first time in a supplemental petition for certiorari which was denied, 348 U.S. 805. This Court's decision in the Marcello case makes no mention of the relation between the savings clause and the deportation section here in-

volved. We therefore submit that the issue has not been implicitly foreclosed and should be considered by this Court because of its recurring importance.

## Conclusion

Upon the basis of the foregoing, it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

### HEARING ON APPLICATION FOR WRIT OF HABEAS CORPUS & ORDER DISCHARGING SAME

Minute entry
February 17, 1954
Wright, J:

(Number and Title Omitted)

This matter came on this day for hearing on application for a Writ of Habeas Corpus.

Present: George R. Blue,
U. S. Attorney,
Prim B. Smith, Jr.,
Asst. U. S. Attorney;
P. M. Flanagan,
Wm. Orchard,
Attorneys for Mover;

Thereupon, the counsel for the United States filed a return to Writ of Habeas Corpus.

After hearing statements of counsel and evidence on behalf of the defendant, It was ordered by the Court that the Writ be discharged.

Bond was then set at $5,000.00.

J. S. W.

## APPENDIX B

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GUISEPPE GAGLIANO, APPELLANT

*versus*

HORACE A. NABERS, Acting officer in Charge, United States Immigration and Naturalization Service, (JOHN M. BONDS, officer in charge substituted as appellee in place and stead of Horace A. Nabers), APPELLEE

Appeal from the United States District Court for the Eastern District of Louisiana

(June 21, 1955)

Before HOLMES, RIVES and TUTTLE, *Circuit Judges.*

PER CURIAM: This appeal, argued and submitted on January 20, 1955, has been held awaiting decision of the Supreme Court in Marcello v. Bonds, No. 145, October Term, 1954. The decision in the Marcello case rendered May 31, 1955, admittedly forecloses all of the appellant's contentions except one. As we understand that contentions, it is that Sections 1251 (a) (11), Title 8, U.S. Code, when considered in the light of the savings clause embodied in the 1952 Act, Section 405 (a), 66 Stat. 280 U.S. Code 1101, note and the decisions in United States v. O'Rourke, 8th Cr., 213 F. 2d 759, and Ex parte Robles-Rubio, D.C. Cal., 119 F.S. 610, should not be construed to affect the status of a non-deportable resident alien. Unfortunately for appellant we think that issue also, whether formally presented and argued or not, was implicitly foreclosed by the Marcello decision, and hence, is no longer open for decision by this Court. The judgment is therefore

Affirmed.

## APPENDIX C

### JUDGMENT

Extract from the Minutes of June 21, 1955.

No. 15056

GUISEPPE GAGLIANO

*versus*

HORACE A. NABERS, Acting Officer in Charge, United States Immigration and Naturalization Service, (JOHN M. BONDS, Officer in Charge substituted as appellee in place and stead of Horace A. Nabers).

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

## APPENDIX D

ORDER DENYING REHEARING

Extract from the Minutes of August 16, 1955.

No. 15056

GUISEPPE GAGLIANO

*versus*

HORACE A. NABERS, Acting Officer in Charge United States Immigration and Naturalization Service, (JOHN M. BONDS, Officer in Charge substituted as appellee in place and stead of Horace A. Nabers).

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby denied.

## APPENDIX E

U. S. DEPARTMENT OF LABOR

Immigration and Naturalization Service
New Orleans, Louisiana
October 25, 1939

In replying please refer to this file number: 39035/45

Mr. Joseph Gagliano,
2800 D'Abadie Street,
New Orleans, Louisiana.

Dear Sir:

Referring to deportation proceedings instituted against you by this Office, you are informed that our Central Office under date of the 16th instant canceled Warrant of Arrest in your case. The matter is therefore considered closed.

Very truly yours,

(S.) EUGENE KESSLER,
*District Director,*
*New Orleans District.*

(4286-1)